THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 107 - 2010

(Arising from Civil Suit No. 819 of 2007)

IFTRA (U) LTD. ..... APPLICANT/ OBJECTOR

Versus

PONSIANO LWAKATAKA ..... JUDGMENT CREDITOR

UGANDA MARINE PRODUCTS LTD. ..... JUDGMENT DEBTOR

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This application is brought under Order 22 r 55(1), 56 and 57 and Order 52 r 1 and 3 of the Civil Procedure Rules, for orders that the property the subject of a warrant of attachment dated 24th March 2010 be immediately released from attachment and costs.

The brief background to this application is that the respondent/judgment creditor obtained judgment in Civil Suit No. 819 of 2007 (Ponsiano Lwakataka V. Uganda Marine Products Ltd) and attached three ice plants, one generator KVA 200 and four containers 20ft and five motor vehicles registration numbers UAH 728D, UAB 547Z, UAB 548Z, UAB 540Z and UAE 433N, pursuant to a warrant of attachment dated 20th March 2010.

In the affidavit in support of this application, Mr. Chandran, the Finance Manager of the applicant deponed that; on the 1st of April 2010, a one Twesigye Richard a bailiff came to the applicant's offices on Plot 46 Kyebando, Gayaza Road in the company of Police Personnel, Local Council officials and other people and took away three complete sets of ice plants, one generator KVA 200 and four refrigerated containers (hereinafter referred to as the suit property). According to Mr. Chandran, the said Mr Twesigye informed him that he had been authorised by this court, on the basis of a

warrant of attachment issued in HCCS No. 819 of 2007 (Ponsiano Lwakataka v. Uganda Marine Products Ltd), to take away the said property. Mr. Chandran deponed that Uganda Marine Products Ltd, the judgment debtor was placed under receivership by East African Development Bank in October 2007, and that in September 2008, Mr. Fulgence Mungereza and Mr. Joram Kariisa the joint receivers/managers of the judgment debtor advertised their appointment and the sale of the judgment debtor's assets.

Mr. Chandran further deponed that the applicant successfully bid and purchased the assets of the judgment debtor from the receivers in August 2009, using finances obtained from Fina Bank Uganda Ltd and Diamond Trust Bank, and took possession of the said assets. Furthermore, that following the purchase of the judgment debtor's assets, the applicant immediately took over the business of fish processing, but was unable to acquire a license in its own name and as such, temporarily continued operating under the license of the judgment debtor.

Mr. Chandran also deponed that the applicant instructed Ligomarc Advocates to secure an order releasing the suit property machinery from attachment, and Mr. Kabiito of Ligomarc Advocates informed him that they had written a letter to the Registrar of the Court, bringing the wrongful attachment of the suit property to the attention of the court, and thereafter the learned Registrar on 1st April 2010, wrote a letter to the bailiff recalling the warrant of attachment.

In reply, Mr. Ponsiano Lwakataka the respondent/judgment creditor deponed that the receivers/managers were appointed as agents for Uganda Marine Products Ltd to collect and pay to the bank the sum of USD 945,000 and that under the law of receivership, once the amount secured by the properties is recovered, then the residue equity reverts to the company as stipulated in the Deed of Appointment of the receivers. Furthermore, Mr. Lwakataka deponed that the applicant exists as Uganda Marines IFTRA, and that in the purported agreement of purchase of the judgment debtor's assets, it was neither stated that the judgment debtor and the applicant are in Partnership nor that the latter can use the name of the former. Furthermore, Mr. Lwakataka deponed that Plot 46 Gayaza Road on which the judgment debtor had its business premises, and everything there at was in the possession of the judgment debtor, and that the sale of the alleged properties by the receivers to the applicant was illegal. Furthermore, that the sale had not become effective by the time of the

attachment, since the properties at the material time were still in the possession of the judgment debtor, and there had been no rebranding of the business by the applicant.

Mr. Lwakataka further deponed that the applicant could not have purchased the applicant's assets including the premises comprised in Block 210 Plot 46, from the receivers and at the same time acquired a lease hold interest vide LRV 4089 Folio 1 in respect of the same land.

In his affidavit in rejoinder, Mr. Manoj Sreekanta deponed that the applicant purchased the assets of the judgment debtor from the receivers and that the applicant exists as a body corporate, incorporated on the 19th February 2009 vide Certificate of Incorporation No. 106104. Furthermore, that the applicant operated under the license of the judgment debtor for some time because of the lengthy procedure involved in obtaining a license, but the applicant applied to have the name of its establishment changed from Uganda Marine to IFTRA (U) Ltd. Furthermore, that upon the said application for change of name, the applicant was advised by the Commissioner of Fisheries that until the list of exporters was amended on the website of the European Union, the applicant would have to continue to export in the name of the judgment debtor.

Mr. Manoj deponed that the applicant has never represented to any person that it is one and the same with the judgment debtor or that there is any form of partnership between the applicant and the judgment debtor. Furthermore, that the warrant of attachment was issued on the 24th of March 2010, in respect of assets that had been purchased by the applicant in August 2009 and therefore, the judgment debtor can not be said to have been in possession of the same at the time of the attachment. Furthermore, Mr. Manoj deponed that the applicant has been in possession of the said assets since October 2009 and the judgment creditor has been aware of the fact that the assets were purchased by and were in the possession of the applicant.

In his affidavit in surrejoinder, Mr. Lwakataka deponed that no court order was obtained by the bank prior to the appointment of the receivers, and that the receivers were not given any instrument containing the particulars of the properties upon which the Bank had interest. Furthermore, that it is highly probable that by the time of attachment, the applicant had not completed the purchase of the attached assets and this is therefore inconsistent with any questions of possession by the applicant. Furthermore, Mr. Rwakataka deponed that, the fact of the judgment debtor still

operating business at the premises of the judgment debtor in Kanyanya, after the purported purchase of the judgment debtor's assets is evidence that the judgment debtor was still in possession of the properties.

At the hearing, the applicant was represented by Ms. Sebatindira, while the judgment creditor was represented by Mr. Kamba.

Counsel for the applicant submitted that the tests for the grant of this application are set out in the case of **TRANS AFRICA ASSURANCE COMPANY LTD V NATIONAL SOCIAL SECURITY FUND** [1999] 1 EA 352. In that case it was held that where any objection is made to the attachment of property it is incumbent on the trial court to investigate the objection as provided by Order 19 (now O. 22 of the CPR). It was further held that the trial Judge has power to examine whether the objector was in possession of that property.

Counsel for the applicant submitted that on 1st April 2010, a one Twesigye Richard went to the applicant's offices with other persons and took away the suit property, pursuant to a warrant of attachment issued by the court. Counsel for the applicant submitted that this confirmed that the applicant had possession of the property at the time of attachment.

Counsel for the applicant further submitted that the applicant had acquired interest in the suit property by way of purchase from the joint receivers of the judgment debtor and that why the applicant continued to use the license of the judgment debtor, even after the purchase of the judgment debtor's assets.

Counsel for the applicant submitted that issues to do with the validity of the appointment of a receiver and the validity of the interest that the applicant had in respect of the land comprised in Kyadondo Block 210 Plot 46 at Kyebando were outside the scope of investigation by the court in this application. In this regard Counsel relied on the case of **UGANDA MINERAL WATERS LTD V AMIN PIRAN & ANOTHER** [1994-95] HCB 87 for this proposition.

Counsel for the applicant submitted that all times the respondent knew that the applicant was in possession of the premises and the assets. She relied on receipts issued by the applicant to the respondent, dated 21st February 2010 and 21st March 2010, marked "Annexture G" to the affidavit in reply, and submitted that therefore, the respondent was aware of the change in possession of the said assets.

In reply, counsel for the respondent submitted that at all material times, the properties attached were in the possession of the judgment debtor and the judgment debtor was still in the business as could be seen from the trade licences from Kawempe Division.

Counsel for the respondent submitted that according to **Gower on Company Law** 8th Ed pg 1135 to 1156, where a debenture holder leaves the company in possession of the assets, it means the receivership has not been effective. In this regard counsel relied on the averments by the applicant's officials that the licenses were all in the names of the judgment debtor and the applicant had not received the relevant instruments and clearance from the fisheries department to take over the business.

Counsel for the respondent submitted that "Annexture B" to the application, showed that at the time of purchase, the consideration had not been fully paid and therefore, the agreement could have been made after the attachment.

Counsel for the respondent further faulted that the said sale agreement is signed by the receivers M/s Mungereza and Kariisa, on the grounds that it was witnessed by unnamed persons, and that the law provides that if the officials of a company sign a document, they must put their names alongside their signatures and once that is not done, the document is not conclusive. In this regard Counsel relied on the case of **FREDRICK ZAABWE V ORIENT BANK & 5 ORS** (SCCA NO.4 OF 2006).

Counsel for the respondent further argued that having realised that mistake, the applicant made another document marked "Annexture A" to the affidavit in rejoinder and inserted the names of the witnesses, and therefore, this document was void. Counsel referred to the authority of **REV EZRA BIGANGISO V NEW MAKERERE KOBIL** (MA No 10 of 2010) for the proposition of law that where it is found that a party, as in this case, has merely made an agreement for purposes of defeating execution then the agreement is void.

Counsel for the respondent argued that the fact that the applicant used the same assets to obtain a loan, before consideration had been fully paid shows that the assets were in the possession of the judgment debtor.

Furthermore, counsel for the respondent also submitted that since receivers in law are agents of the company, the principal remains in possession of the assets during receivership and therefore the warrant of attachment was issued before the applicant

took full possession of the assets of the judgment debtor. Counsel also submitted that receivership is different from liquidation because under receivership, the company continues to operate and therefore, the judgment debtor was still in operation.

Counsel for the respondent further submitted that the applicant had not paid stamp in respect of the sale agreement, and this issue had also been raised in MA No. 217 of 2010, which is related to this application and as thus, the agreement could not be relied upon by the applicants in court.

Counsel for the respondent further queried the receipts marked "Annexture G" to the affidavit in rejoinder, which counsel for the applicant relied on to prove that the respondent was aware that the assets of the judgment debtor were in the possession of the applicant, on the ground that there was no signature and that the respondent has never dealt with the applicant. In addition the Ministry had only allowed the applicant to deal with the fish business in the names of the judgment debtor, so the said documentation could not be in the names of the applicant.

I have considered the submissions of both counsels and the authorities cited for which I am grateful.

The test to be met in an application for release of property from attachment is well settled. It is laid down under Order 22 r 55, 56, 57 and 58 of the Civil Procedure Rules and in several authorities.

The question to be determined by the court in an application of this nature is one of possession. This position of the law has been stated in several cases. In the case of **HARILAL & CO. V BUGANDA INDUSTIES LTD** [1960] EA 315 **Lewis J;** citing CHITALEY QND RAO'S CODE OF CIVIL PROCEDURE 6th EDN pg 1588 on what has to be decided under O. 19 r 55 *(now O.22 r 55*), which is the same as the Indian O. 21 r 58, found as follows;

> *"What is to be investigated is indicated by the next three following rules, viz r 59, 60, and r 61. The question to be decided is, whether on the date of attachment, the judgment debtor or the objector was in possession, or where the court is satisfied that the property was in the possession of the objector, it must be found whether he held it on his own account or in trust for the judgement-debtor. The sole question to be investigated is, thus, one of*

possession. Questions of legal right and title are not relevant, except so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment debtor or some other person. To that extent the title may be part of the inquiry. But ultimate questions like the Benami nature of a transaction are not within the scope of the inquiry and are not intended to be gone into.

'As pointed out by Mr. Justice Sadasiva Ayyar in Ramaswami Chetty V. Mallapa;

"In summary proceedings held in accordance with certain statutory provisions intended for speedy disposal of 'emergent' disputes, the court may be prohibited from going into complicated questions like fraud, trust and so on, while giving the party defeated in the summary inquiry, the right to have the whole matter and all the questions which are in dispute fully investigated in an ordinary regular suit...The court is bound to order the release of the attached property if it finds possession in the claimant on his own account, even if there is title and power remaining in the judgment debtor."

The submissions of counsel for the applicant in summary are that the applicant was in possession of the suit property at the time of the attachment, because the applicant had purchased the assets of the judgment debtor from the receivers/managers.

The respondent on the other disputes the possession of the suit property by the applicant on several grounds; firstly, that the applicant had not yet paid the full consideration for the purchase of the assets of the judgment debtor. Secondly, that the applicant was at the time of attachment still carrying on business under the license of the judgment debtor and therefore was not in possession of the suit property, at the time of attachment. Thirdly, that the applicant can not rely on the sale agreement because no stamp duty was paid in respect of it and that it was not properly attested as required under the law.

In a related matter MA No. 217 of 2010 (Fulgence Mungereza & Kariisa V. Ponsiano Lwakataka) which was filed in this same court, for release of five trucks, the property in that application were the subject of the warrant of attachment dated 24th march 2010. This is the same warrant of attachment in this present application. In MA No. 217 of 2010, I referred to the author Sir Raymond Walton in the book "KERR ON RECEIVERS AND ADMINISTRATORS" 17th Ed at pg 158 who states as follows;

> *"Crystallisation of floating charge. The appointment of a receiver-who will almost invariably be known as 'an administrative receiver'- is one of the events which causes a floating charge to crystallise. The order operates from the date when the appointment becomes effective. The receiver becomes entitled to possession of the company's assets, and any interference with his possession is a contempt of court..."*

I also referred to the case of **JOHN VERJEE & ANOR V SIMON KALENZI & ORS** (CACA No. 71 of 2000) reported in [1997-2001] UCLR 83 in which Twinomujuni JA, found that,

> *"Once a receiver has taken possession of the property before attachment, that property can not be attached by the other subsequent decree holders against the judgment debtor."*

Furthermore, **Kitumba JA** and **Twinomujuni JA** found that although receivers are in law the agents of the debtor company, they hold property to pay the debts of the company, and therefore, the receivers are in possession not on behalf of the judgment debtor but for the mortgagee.

In MA No. 217 of 2010, I also found that the receivers took possession of the property of the judgment debtor at the time of appointment and as thus, the property was not liable to attachment.

Applying those findings to this present application the question then is whether the applicant took possession of the suit property, by virtue of the alleged purchase of the property from the receivers.

The sale of the assets of the judgment debtor was advertised by the receivers in the East African Newspaper of November 19-25th 2007, and the New Vision dated May 20th 2008, as evidenced in Annextures "B" and "C" to the application. There is an agreement for the sale and purchase of land comprised in Kyadondo Block 210 Plot 46 at Kyebando together with all the developments, plant and machinery thereon, which was executed between the receivers of the judgment debtor and the applicant. Whereas the agreement attached as "Annexture D2" to the application is neither dated nor the names of the witnesses indicated in Latin character, the agreement provided that the purchaser agreed to buy the property and the assets for the full price of US $ 680,000.00 exclusive of VAT payable by the purchaser. The consideration was to be paid by way of electronics funds transfer of the initial instalment of the

purchase price to Standard Chattered Bank in the account held by East African Development Bank. It was further provided that the balance would be paid within one month of the execution of the agreement.

Looking at "Annexture D3" I find that on August 20th 2009, an electronic funds transfer was made in the names of IFTRA .

Counsel for the respondent has raised issues concerning the validity of the sale of the assets of the judgment debtor (including the land) by the receivers, and the subsequent purchase of these assets by the applicant.

With regard to the validity of the sale agreement, and the interest in the said land, there are several authorities that can be applied to this situation.

In the case of **UGANDA MINERAL WATERS LTD V PIRAN & ANOR** [1994-95] HCB 87, **Musoke Kibuuka Ag J** (as he then was) found that the scope of investigation to be carried out by the court under Order 19 r 55 (1), 56 and 57 of the Civil Procedure Rules is not determining ownership being threatened by attachment. At the end of the objector proceedings one of the parties must sue in order to determine the issue of title to the property. An order made under the rule according to the Hon. Judge therefore is only provisional and a suit may be brought to claim the property.

There is also the authority of **JOHN VERJEE & ANOR V SIMON KALENZI & ORS** (above) which is instructive. In that case, the appellant argued that the failure by the objector to register the debenture and the mortgage, under which the respondents as receivers of the judgment debtor had been appointed, as required under S. 96 of the Companies Act, invalidated the mortgage and as thus, the objectors could not have an interest in the suit property. **Lady Justice Mukasa Kikonyogo DCJ** (as she then was) found as follows;

> *"In objector proceedings, it did not matter whether the respondents held as legal mortgagees or as receivers. The issue which had to be investigated by the court and decided was that of possession. To that extent, the judge was right when she held that "the question of whether the mortgage has lapsed is not within the scope of this investigation....I am of the view that the issue of non- registration of the debenture or otherwise are not matters to be decided in objector proceedings and the appellants are aware of that legal position."*

I am of the considered opinion that questions of validity of the sale agreement, and the validity of the interest that the applicant acquired in the land comprised in Block 210 Plot 46 at Kyebando are therefore not questions to be considered by the court in this present application. What the court is required to investigate is the issue of possession, as stated in the case of HARILAL (above). The test to be applied in an application of this nature is, *"whether at the time of the attachment, the property was in the possession of the objector, on his or her own account, or on account of any other person"*.

Counsel for the applicant submitted that at the time of the attachment, the applicant was in possession of the suit property. On the other hand, counsel for the respondent has argued that the applicant was operating under the license of the judgment debtor and as thus, the judgment debtor was in possession.

There is a letter dated 20th August 2009 from the receivers, addressed to Uganda Marine/IFTRA Uganda Limited marked "Annexture C" to affidavit in rejoinder stating inter alia that,

> *"As had been agreed prior to the execution of the agreement, we wish to confirm that, subject to any required approvals/consents and/or registrations from the regulating Government department, the licenses of Uganda Marine Products Limited shall, where applicable and transferrable be deemed to form part of the assets sold and transferred by the receiver to IFTRA under the sale agreement."*

From this letter it is clear that the receivers handed over the licenses of the judgment debtor to the applicant, and I find that this letter confirms that there was a sale of the assets of the judgment debtor to the applicant.

Furthermore, in another letter dated 4th May 2010 from the office of the Commissioner Department of Fisheries makes reference to a letter dated 22nd March 2010 in which the applicant requested the Competent Authority to have the establishment named Uganda Marine Product Ltd located on plot 46 Gayaza Road amended to IFTRA Uganda Ltd, located on the same premises. The letter from the Office of the Commissioner Department of Fisheries amended the establishment on 4th May 2010.

This further confirms that until the establishment was amended on 4th May 2010, the applicant was still operating under the business of the judgment debtor. Be that as it may, I have already found that there was a sale of the assets of the judgment debtor to the applicant.

In the case of **TRANS AFRICA ASSURANCE CO. V NATIONAL SOCIAL SECURITY FUND** [1999] 1 EA 352, Mukasa-Kikonyogo found that,

> *"The fact that the disputed property was still registered in the name of the judgment debtor was not detrimental to the objector's claim nor conclusive evidence of ownership by the judgment debtor. I agree with DCJ Manyindo that whilst registration leads to the presumption of ownership, it can not be conclusive evidence of ownership. It is rebuttable as it was successfully done in this case."*

On the basis of this authority, I am convinced that the fact that the applicant had not amended its establishment/name from the judgment debtor is not detrimental to the applicant's interest in the suit property, owing to the fact that the applicant has proved that it had taken over the establishment by way of purchase of the judgment debtor's assets.

All in all, I am satisfied that the applicant had purchased the assets of the judgment debtor including the suit property, and as thus had both possession and interest in the suit property at the time of the attachment. Any questions surrounding the legality of the sale of the suit property are matters to do with ownership, to be handled in a separate suit.

In the premises, the application succeeds. I order that the three complete sets of ice plants, one generator KVA 200 and four refrigerated be immediately released from attachment. Cost to the Applicant.

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Justice Geoffrey Kiryabwire

JUDGE

Date: 02/05/2012

02/05/12

Ruling summary read in court with costs to the Applicant in the presence of;

- Kakuru Martin h/b for Ruth Sebatindira

In Court
- None of the parties
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 02/05/2012